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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

MARCUS E. COLLINS and THE GEORGIA DEPARTMENT OF REVENUE,

Cross-Petitioners,

v.

CHARLES J. REICH,

Cross-Respondent.

Cross-Petition For Writ Of Certiorari To The Supreme Court of Georgia

CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court's decision in *Davis v. Michigan*, 489 U.S. 803 (1989), invalidating income tax statutes in Michigan which taxed federal retirement benefits but exempted retirement benefits paid by the state and its political subdivisions, applies retroactively, as a federal choice-of-law matter, to periods before *Davis* was announced.

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CHARLES J. REICH,

Cross-Respondent.

Cross-Petition For Writ Of Certiorari To The Supreme Court of Georgia

CROSS-PETITION FOR WRIT OF CERTIORARI

This cross-petition for writ of certiorari has been filed in order to preserve for review that portion of the Georgia Supreme Court's opinion which held that *Davis v. Michigan*, 489 U.S. 803 (1989), applies retroactively, as a federal choice-of-law matter, to periods before *Davis* was announced. The same issue is now before this Court in *Harper v. Virginia Dep't of Taxation*, No. 91-794.

CITATION TO OPINION BELOW

The opinion of the Georgia Supreme Court is officially reported at 262 Ga. 625 (1992), and is unofficially

reported at 422 S.E.2d 846 (1992). A copy of the court's opinion is also attached as Appendix A to the Petition for Writ of Certiorari filed by Charles J. Reich, which has been docketed as Case No. 92-1276.

STATEMENT OF JURISDICTION

The decision of the Georgia Supreme Court was entered on November 19, 1992. Cross-Petitioners' motion for reconsideration of that portion of the court's opinion concerning the retroactive application of *Davis* was denied on December 17, 1992. On January 29, 1993, Charles J. Reich filed his petition for writ of certiorari, which has been docketed as Case No. 92-1276, seeking to review other portions of the Georgia Supreme Court's opinion. This cross-petition is filed within the time allowed by law, *see* U.S. Sup. Ct. Rule 13.4, without regard to the provisions of U.S. Sup. Ct. Rule 12.3, and jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS AT ISSUE

(1) 4 U.S.C. § 111:

> The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States, a territory or possession or political subdivision thereof, the government of the District of Columbia, or an agency or instrumentality of one or more of the foregoing, by a duly constituted taxing authority having jurisdiction, if the

taxation does not discriminate against the officer or employee because of the source of the pay or compensation.

(2) O.C.G.A. § 48-7-27(a)(4) (1982) (Appendix A)

STATEMENT OF THE CASE

On March 28, 1989, this Court ruled in *Davis v. Michigan*, 489 U.S. 803 (1989), that income tax statutes in Michigan, which provided for the taxation of federal retirement benefits but exempted retirement benefits paid by the state and its political subdivisions, violated 4 U.S.C. § 111 and principles of intergovernmental tax immunity. At the time of the *Davis* decision, Georgia's income tax statutes totally exempted pension income received from the Employees' Retirement System of Georgia, the Teachers Retirement System of Georgia, and certain other retirement systems, *see* O.C.G.A. § 48-7-27(a)(4) (1982), but did not afford the same treatment to federal retirement benefits. In response to *Davis*, the Georgia General Assembly, during special session in September 1989, amended Georgia's law to provide identical treatment for federal, state, and private pensions, for the tax years 1989 and forward. *See* O.C.G.A. § 48-7-27(a)(5) (Supp. 1992).

Shortly after *Davis* was announced, Cross-Respondent Charles J. Reich ("Colonel Reich" or "the taxpayer") filed refund claims with the Department of Revenue for Georgia income taxes which he had voluntarily paid on his military retirement benefits for the years 1985 through 1988. When the Department denied his claims, the taxpayer brought suit under O.C.G.A. § 48-2-35, contending

that Georgia's taxation of such amounts violated the principles set forth in *Davis*, the Fifth and Fourteenth Amendments to the U.S. Constitution, and comparable provisions of the Georgia Constitution. Among other grounds, Cross-Petitioners defended on the basis that *Davis* did not apply retroactively to years before *Davis* was announced. Both the Cross-Petitioners and the taxpayer subsequently filed motions for summary judgment.

In its final order, the trial court ruled that Georgia's pre-1989 income tax statute was legally indistinguishable from the statute considered in *Davis*. (Petition for Writ of Certiorari, No. 92-1276, Appendix C.) However, the trial court also determined, based on the three-part test set forth in *Chevron Oil v. Huson*, 404 U.S. 97 (1971), that *Davis* should not be applied retroactively to any tax years ending before the *Davis* decision was rendered, and that no refunds were due. The Georgia Supreme Court granted Colonel Reich's application for discretionary appeal. *See* O.C.G.A. § 5-6-35(a).

On November 19, 1992, the Georgia Supreme Court held that the state's pre-1989 income tax statutes violated the principles of *Davis*, and that this Court's decision in *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991), mandated retroactive application of *Davis*. However, the Georgia Supreme Court also determined that O.C.G.A. § 48-2-35, which provides for refunds of taxes "erroneously or illegally assessed and collected", did not apply to taxes paid under a law later held unconstitutional, and that Colonel Reich was therefore not entitled under that statute to the refunds he sought. Cross-Petitioners' motion for reconsideration of that portion of the court's opinion concerning the retroactive application of

Davis was denied on December 17, 1992. (Appendix B hereto, and Petition for Writ of Certiorari, No. 92-1276, Appendix B.)

ARGUMENT

This cross-petition for writ of certiorari has been filed in order to preserve for review that portion of the Georgia Supreme Court's opinion which held that *Davis v. Michigan,* 489 U.S. 803 (1989), applies retroactively, as a federal choice-of-law matter, to periods before *Davis* was announced. This Court is expected to definitely answer this question in *Harper v. Virginia Dep't of Taxation,* No. 91-794. The instant cross-petition should be held pending the decision in *Harper.* If the Court determines in *Harper* that *Davis* does not apply retroactively in the manner urged by the taxpayer, and as held by the Georgia Supreme Court, Cross-Petitioners submit that their cross-petition should be granted, and that the Court should summarily reverse and remand.

CONCLUSION

Cross-Petitioners respectfully request that the instant cross-petition for writ of certiorari be held pending this Court's decision in *Harper,* with the disposition of the cross-petition to depend on the final outcome in *Harper.*

Respectfully submitted,

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APPENDIX A

48-7-27. Taxable net income; method of computation; deductions; deduction of income received from certain public pension or retirement funds or systems; addition of certain dividend or interest income; disallowance of certain deductions and losses; nonrecognition of gains or losses on sale or exchange of property; validity of other exemptions; elections.

(a) Georgia taxable net income of an individual shall be the taxpayer's federal adjusted gross income, as defined in the United States Internal Revenue Code of 1954, less:

(1) Either the sum of all itemized nonbusiness deductions if the taxpayer used itemized nonbusiness deductions in computing federal taxable income or, if the taxpayer could not or did not itemize nonbusiness deductions, then the standard deduction allowed under United States Internal Revenue Code of 1954 in force and effect on January 1, 1974. For tax years beginning on or after January 1, 1983, there shall be subtracted either the sum of all itemized nonbusiness deductions, if the taxpayer used itemized nonbusiness deductions in computing federal taxable income, or, if the taxpayer could not or did not itemize nonbusiness deductions, a standard deduction as provided for in the following subparagraphs:

(A) In the case of a single taxpayer or a head of household, 15 percent of the taxpayer's adjusted gross income, but not more than $2,300.00 and not less than $1,500.00;

(B) In the case of a married taxpayer filing a separate return, 18 percent of the taxpayer's adjusted gross income, but not more than $1,500.00 and not less than $850.00; or

(C) In the case of a married couple filing a joint return, 18 percent of the taxpayer's adjusted gross income, but not more than $3,000.00 and not less than $1,700.00;

(2) The exemptions provided for in Code Section 48-7-26 together with the adjustments provided for in subsection (b) of this Code section;

(3) The amount of salary and wage expenses eliminated in computing the individual's federal adjusted gross income because the individual has taken a federal jobs tax credit which requires, as a condition to using the federal jobs tax credit, the elimination of related salary and wage expenses;

(4)(A) Income received from the following, and only the following, public pension or retirement funds or systems when the income is otherwise included in the taxpayer's federal adjusted gross income:

(i) Employees' Retirement System of Georgia;

(ii) Georgia Firemen's Pension Fund and all local firemen's pension funds;

(iii) Peace Officers' Annuity and Benefit Fund of Georgia;

(iv) Trial Judges and Solicitors Retirement Fund;

(v) Superior Court Clerks' Retirement Fund of Georgia;

(vi) Public School Employees Retirement System;

(vii) Georgia Legislative Retirement System;

(viii) Teachers Retirement System of Georgia and all local teachers' retirement systems;

(ix) Teachers' retirement systems or funds of states having a reciprocal agreement with this state to exempt income from the Teachers Retirement System of Georgia from taxation;

(x) Funds, programs, or systems the income from which is exempted by federal law or treaty;

(xi) Superior Court Judges Retirement System; and

(xii) District Attorneys' Retirement System;

(B) It is the intent of the General Assembly that no income from a public pension or retirement fund, program, or system shall be exempt from income taxation in this state unless the exemption is provided for in this paragraph or unless the law granting the exemption makes specific reference to this paragraph;

(5)(A) Retirement income not to exceed $2,000.00 per year received from any source. This paragraph shall not apply to or affect retirement income which is already wholly

exempt from income taxation because it is received from a public pension or retirement fund or system listed in subparagraph (4)(A) of this subsection. A taxpayer shall be eligible for the $2,000.00 exclusion granted by this paragraph only if he:

(i) Is 62 years of age or older during any part of the taxable year; or

(ii) Is permanently and totally disabled in that he has a medically demonstrable disability which is permanent and which renders him incapable of performing any gainful occupation within his competence.

(B) The commissioner shall by regulation require proof of the eligibility of the taxpayer for the exclusion allowed by this paragraph.

(b)(1) There shall be added to the taxable income:

(A) Dividend or interest income, to the extent that the dividend or interest income is not included in gross income for federal income tax purposes, on obligations of any state except this state or of political subdivisions except political subdivisions of this state; and

(B) Interest or dividends on obligations of the United States or of any authority, commission, instrumentality, territory, or possession of the United States which by the laws of the United States are exempt from federal income taxes but not from state income taxes.

(2) There shall be subtracted from taxable income interest or dividends on obligations of the United States and its territories and possessions or of any authority, commission, or instrumentality of the United States to the extent includable in gross income for federal income tax purposes but exempt from state income taxes under the laws of the United States. Any amount subtracted under this paragraph shall be reduced by any expenses directly attributable to the production of the interest or dividend income.

(3) There shall be added to taxable income any income taxes imposed by any tax jurisdiction to the extent deducted in determining federal taxable income.

(4) No portion of any deductions or losses including, but not limited to, net operating losses, which occurred in a year in which the taxpayer was not subject to taxation in this state, may be deducted in any tax year. When federal adjusted gross income includes deductions or losses not allowed pursuant to this paragraph, an adjustment deleting them shall be made under rules established by the commissioner. Losses incurred prior to January 1, 1971, shall be deductible only to the extent allowed by law at the time they were incurred; and the commissioner shall provide rules to preserve the deductibility of losses incurred prior to January 1, 1971, to the extent that the losses would have been deductible as net operating loss carryovers for a taxable year or years beginning on or after January 1, 1971, if Ga. L. 1931, Ex. Sess., p. 24, Section 11 (as amended by Ga. L. 1952, p. 405, Section 10-A; Ga. L. 1953, Jan.-Feb. Sess., p. 279,

Sections 1-3; Ga. L. 1953, Nov.-Dec. Sess., p. 316, Section 1; and Ga. L. 1961, p. 565, Section 3; repealed by Ga. L. 1971, p. 605, Section 6) had continued in effect after January 1, 1971.

(5) Income, losses, and deductions previously used in computing Georgia taxable income shall not again be used in computing Georgia taxable income; and the commissioner shall provide for needed adjustments by regulation.

(6) When, on the sale or exchange of real or tangible personal property located in this state, gain or loss is not recognized because the taxpayer receives or purchases similar property, the nonrecognition shall be allowed only when the property is replaced with property located in this state.

(7) Except as otherwise provided in paragraph (4) of subsection (a) of this Code section, this chapter shall not be construed to repeal any tax exemptions contained in other laws of this state not referred to in this Code section. Those exemptions and the exemptions provided by federal law and treaty shall be deducted on forms provided by the commissioner.

(8) All elections made by the taxpayer under the Internal Revenue Code of 1954 shall also apply under this article. (Code 1933, § 92-3107, enacted by Ga. L. 1971, p. 605 § 4; Ga. L. 1975, p. 843, § 1; Ga. L. 1978, p. 1456, § 1; Ga. L. 1979, p. 888, § 2; Code 1933, § 91A-3607, enacted by Ga. L. 1978, p. 309, § 2; Ga. L. 1979, p. 5, § 67; Ga. L. 1979, p. 888, § 4; Ga. L. 1980, p. 10, §§ 17, 18; Ga. L. 1981, p. 1857, §§ 35, 36; Ga. L. 1981, p. 1903, §§ 3, 4; Ga. L. 1982, p. 3, § 48.)

APPENDIX B

IN THE SUPREME COURT OF GEORGIA

CHARLES J. REICH, Appellant, v. MARCUS E. COLLINS, SR., Individually and in his capacity as Georgia State Revenue Commissioner, and the GEORGIA DEPARTMENT OF REVENUE, Appellees.	*	CASE NOS. S92A0621 and S92A0622

MOTION FOR RECONSIDERATION

Appellees Marcus E. Collins, Sr., State Revenue Commissioner, and the Georgia Department of Revenue (collectively "the State") respectfully move, pursuant to Rule 47 of the Georgia Supreme Court, for reconsideration of Division 1 of the Court's November 19, 1992 opinion (copy attached), holding that the U.S. Supreme Court's decision in *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989) applies retroactively to tax years before *Davis* was announced.

In Division 1 of its opinion, the Court concludes that the federal choice-of-law question must be decided by reference to *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991), rather than under the three-part test prescribed by *Chevron Oil v. Huson*, 404 U.S. 97 (1971), and must be decided in Colonel Reich's favor, because "the [U.S. Supreme] Court applied its decision [in *Davis* retroactively] to the taxpayer before it. " In *Davis*, Michigan had previously agreed to pay Mr. Davis a refund if

Michigan's statutes were found to violate federal law. The State respectfully submits that, given this concession, the retroactive application of the Supreme Court's decision in *Davis* to the taxpayer in that case was not at issue. *See, e.g., Sheehy v. State,* 820 P.2d 1257, 1259 (Mont. 1991) ("Because of that concession, the Court did not consider the issue of whether retroactive application should be granted.") However, the Court concludes here that Michigan conceded only the remedy which Mr. Davis would receive if Michigan's statutes were retroactively invalidated, since "[i]t does not follow that if the Supreme Court had determined that its decision in *Davis* was to be prospective only . . . that the State of Michigan would have conceded the taxpayer was due a refund." In fact, "[a] State is free . . . to provide broader relief as a matter of state law than is required by the Federal Constitution," *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco,* 496 U.S. 18, 52 n.36 (1990), and the question of retroactivity may be irrelevant under the tax statutes of the particular state. *See, e.g., Hackman v. Missouri,* 771 S.W.2d 77, 81 (Mo. 1989), *cert. denied,* 493 U.S. 1019 (1990) ("[W]e hold that by its adoption of Section 143.801, the State of Missouri has consented to a refund of any overpayment . . . of income tax. . . . Having so concluded, there is no need to consider whether *Davis* should be applied retroactively or only prospectively . . . . ") There is nothing in the *Davis* opinion itself or the record of that case to indicate that Michigan's concession was conditioned on a retroactive holding of unconstitutionality.

In its November 19 opinion, the Court also states that the U.S. Supreme Court itself, in *Barker v. Kansas,* 112 S. Ct. 1619 (1992), has already applied *Davis* retroactively. In

Barker, the U.S. Supreme Court rejected the argument that military retired pay is "significantly different" from other retirement income, within the meaning of *Davis,* reversed the contrary holding of the Kansas Supreme Court, and remanded "for further proceedings not inconsistent with this opinion." 112 S. Ct. at 1626. Because "[t]he [U.S. Supreme] Court reversed and remanded to the lower court for a determination of the remaining issues, including the taxpayers' entitlement to refunds of taxes previously paid", the Court finds here that *Davis* was applied retroactively to the litigants in *Barker.* However, the taxpayers in *Barker* had sought not only refunds, but also a declaratory judgment regarding the validity of Kansas' statutes (which were still in effect) and an injunction prohibiting future assessments against military retirees under the challenged law. 112 S. Ct. at 1622. The Kansas Supreme Court can still, consistent with the U.S. Supreme Court's opinion in *Barker,* hold that *Davis* applies prospectively only and that the taxpayers are entitled to declaratory judgment and an injunction but no refunds. The *Barker* decision does not suggest or imply that *Davis* must be applied in any other fashion.

For the reasons set out above, the State respectfully moves that the Court reconsider Division 1 of its November 19 opinion.

This 30th day of November, 1992.

Respectfully submitted,

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Attorney General

/s/ Daniel M. Formby
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Senior Assistant Attorney General

/s/ Warren R. Calvert
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PLEASE SERVE ALL
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CERTIFICATE OF SERVICE

I do hereby certify that I have this date served a copy of the foregoing MOTION FOR RECONSIDERATION upon:

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by placing the same into the United States mail with adequate first class postage placed thereon.

This 30th day of November, 1992.

/s/ Warren R. Calvert
WARREN R. CALVERT
Senior Assistant Attorney General